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Nos. 77-1860 and 77-1861

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID WAYNE RANKIN, PETITIONER

v.

UNITED STATES OF AMERICA

DOYLE KENT OGDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals in No. 77-1860 (Pet. App. 10-14) is reported at 572 F.2d 503. The

opinion of the court of appeals in No. 77-1861 (Pet. App. 10-12) is reported at 572 F.2d 501.

JURISDICTION

The judgments of the court of appeals were entered on May 4, 1978. Petitions for rehearing were denied on May 30, 1978. The petitions for a writ of certiorari were filed on June 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether probable cause existed to search petitioners' cars at a permanent border patrol checkpoint.
2. Whether the district court impermissibly restricted petitioners' cross-examination of government witnesses.
3. Whether the district court erred in refusing to permit petitioners' counsel to conduct the voir dire of prospective jurors.
4. Whether a statement by petitioner Ogden was improperly admitted against petitioner Rankin.
5. Whether petitioner Ogden's confession was properly introduced at this trial.

STATEMENT

Following separate jury trials in the United States District Court for the Southern District of Texas, petitioners were convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C.

841(a)(1). Petitioner Rankin was sentenced to three years' imprisonment to be followed by a special parole term of four years. The court of appeals affirmed (77-1860 Pet. App. 10-14). Petitioner Ogden was sentenced to four years' imprisonment to be followed by a special parole term of five years. The court of appeals affirmed (77-1861 Pet. App. 10-12).[1]

The evidence at the trials showed that at 6:00 a.m. on March 9, 1976, petitioner Rankin, driving a Buick with an Oklahoma license plate and a Fort Sill, Oklahoma, sticker, was stopped at a permanent border patrol checkpoint seven miles south of Falfurrias, Texas. As border patrol agent Gordon Reed was questioning Rankin about his citizenship, he detected the odor of marijuana. The agent asked Rankin to open the trunk and Rankin did so. Inside the trunk the agent found some 500 pounds of marijuana bricks. Petitioner was placed under arrest and given *Miranda* warnings (R. Tr. 35-41, 67, 100-101, 215; O. Tr. 12-16).[2]

Twenty-five minutes later petitioner Ogden drove up in a Chevrolet and stopped at the checkpoint. This car also bore an Oklahoma license plate and a Fort Sill sticker (O. Tr. 17-18; R. Tr. 43, 47, 50).

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[1] Although petitioners were tried separately and their appeals were separately considered, we have consolidated our response to their petitions because most of the same facts are involved in each case and because petitioners raise some of the same issues.

[2] "R. Tr." refers to the transcript of petitioner Rankin's trial; "O. Tr." refers to the transcript of petitioner Ogden's trial.

As Agent Reed was questioning Ogden about his citizenship, he saw a can of air freshener on the front seat and detected the odor of marijuana (O. Tr. 17-18, 20). Reed then asked Ogden to open his trunk (O. Tr. 18, 27-28, 30). Ogden got out of his car and stated that the agent should obtain a search warrant and that Ogden wanted a lawyer present before his trunk was opened (O. Tr. 19). When Ogden refused to open the trunk or surrender the keys, Reed and another agent forcibly took the keys from him and opened the trunk (O. Tr. 26, 31-32). Inside the trunk the agents found bricks of marijuana weighing 365 pounds, similar to those earlier discovered in Rankin's car (O. Tr. 20, 110). Ogden was arrested and immediately given *Miranda* warnings, and he indicated that he understood his rights (O. Tr. 20-22).

Shortly thereafter DEA agents arrived to take petitioners to the DEA regional office in Corpus Christi, Texas. The agents advised petitioners that they were under arrest for possession of marijuana with intent to distribute and again advised them of their *Miranda* rights (R. Tr. 94-95; O. Tr. 63, 100, 107, 115). Petitioners both replied that they understood their rights (R. Tr. 95; O. Tr. 63). During the trip to Corpus Christi, Ogden told Agent Louis Dracoulis that he was working for some people out of Oklahoma City and had made approximately eight trips to the "valley" to pick up marijuana as their "number one trucker". He stated that he was to be paid $8,000 for transporting the load of marijuana in his car and that he was paying Rankin $1,000 to

help him drive the marijuana back to Oklahoma City (O. Tr. 106-107).

Upon arrival at the Corpus Christi office, Ogden made a similar confession to DEA Agent John Eakes (O. Tr. 109-116). At Corpus Christi, Rankin also admitted to Eakes that Ogden had agreed to pay him $1,000 to transport the marijuana to Oklahoma (R. Tr. 113, 114, 155).

ARGUMENT

1. Petitioners' contention (77-1860 Pet. 6; 77-1861 Pet. 6) that "olfactory identification of marijuana by a border patrol agent at a permanent checkpoint" is insufficient to establish probable cause to search the trunk of an automobile, is contrary to numerous decisions on the question. See, *e.g.*, *United States* v. *Gutierrez*, 560 F.2d 195 (5th Cir. 1977); *United States* v. *Vale*, 558 F.2d 237 (5th Cir. 1977); *United States* v. *Torres*, 537 F.2d 1299 (5th Cir. 1976); cf. *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977).[3] Petitioners cite no decisions in support of their contention, and we are aware of none. The contention does not merit review by this Court.

2. Petitioners allege (77-1860 Pet. 6; 77-1861 Pet. 8) that the district court in both trials erred in limiting their cross-examination of a "key government witness," during which, they claim, they "sought to establish motive or animus."

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[3] Since the searches in these cases were of the trunks of automobiles stopped on the highway, no warrant was required. See *United States* v. *Chadwick, supra*, 433 U.S. at 12-13.

Neither petitioner specifies the witness or the incident in question. If they are referring to petitioner Rankin's attempt to determine whether Agent Reed was familiar with the legal standards concerning border stops and searches at the time he stopped Rankin (R. Tr. 51-55), the district court properly prohibited the questions.[4] As the court of appeals stated (77-1860 Pet. App. 14), "the agent's knowledge of the appropriate legal standards is not relevant to the constitutionality of the stop."

3. Petitioners claim (77-1860 Pet. 8; 77-1861 Pet. 8) that the district court, which ~~concluded~~ conducted the voir dire on the basis of written questions submitted to it by counsel, erred because it refused to allow defense counsel to ask questions directly to prospective jurors. Petitioner's contention is without substance. Rule 24(a) of the Federal Rules of Criminal Procedure explicitly provides that the trial judge may conduct the voir dire examination personally. See also *United States* v. *Grismore*, 546 F.2d 844 (10th Cir. 1976); *United States* v. *Wertis*, 505 F.2d 683 (5th Cir. 1974), cert. denied, 422 U.S. 1045 (1975); *United States* v. *Erickson*, 472 F.2d 505 (9th Cir. 1973).[5]

[4] Our review of the transcript of petitioner Ogden's trial discloses no similar attempt.

[5] Petitioner Rankin also states (Pet. 3-4), without arguing, that the trial court refused to ask the jurors any of the questions requested by defense counsel. Petitioner fails to specify the questions the court allegedly refused to ask, nor did he have the transcript of the jury selection procedure transcribed. In these circumstances, it is impossible to evaluate petitioner's claim. See Rules 19(b) and 23(1)(h), (3) and (4) of the Rules of this Court. In any event, petitioner failed to raise this issue in the court of appeals, and it is well settled that this Court will not review questions not raised in the court below. *United States* v. *Lovasco*, 431 U.S. 738, 788, n.7 (1977).

4. Petitioner Rankin alleges (Pet. 6-7) that the district court erred in allowing DEA Agent Eakes to testify that Ogden had told Eakes that Ogden was paying Rankin $1,000 to transport the marijuana to Oklahoma. But Eakes never gave any such testimony. Rather, he testified only (R. Tr. 155) that Rankin stated to him that he was being paid $1,000 by Ogden to drive the car to Oklahoma. Therefore, since only petitioner's own admission was received into evidence, this case presents no question under *Bruton* v. *United States*, 391 U.S. 123 (1968).

5. Petitioner Ogden contends (Pet. 6-7) that his confession was involuntary and should not have been admitted because the agents allegedly inflicted "injury and pain" on him for a minimum of 45 minutes and extorted his confession by threatening him with a charge of assault on a federal officer (Pet. 6). Petitioner's claim is refuted by the record.

Testimony adduced at the hearing conducted to determine the voluntariness of Ogden's confession (O. Tr. 64-104)[6] established that during the struggle to obtain Ogden's keys, Agent Jacobs placed a pair of handcuffs on him (O. Tr. 82). Immediately after the agents discovered marijuana in the trunk of

[6] This hearing was conducted during the trial and outside the presence of the jury.

his car, Ogden was given *Miranda* warnings, which he stated that he understood. Agent Jacobs testified (O. Tr. 84-85, 89) that when he handcuffed Ogden, he made sure that there were air spaces between the handcuffs and Ogden's wrists to provide circulation. Jacobs further testified (O. Tr. 84-85) that Ogden was "hollering the entire time" but that he and Agent Reed ignored him after ascertaining that the handcuffs could not be hurting him. Thereafter, when Ogden insisted that the handcuffs were too tight, Reed loosened them (O. Tr. 75-96).[7]

When DEA Agent Dracoulis arrived to transport Ogden to Corpus Christi, he placed a set of his own handcuffs on Ogden, advised him that he was under arrest for possession of marijuana with intent to distribute, and gave him further *Miranda* warnings (O. Tr. 66-67). Dracoulis testified (O. Tr. 72) that Ogden did not appear to be in any discomfort. Indeed, Ogden himself testified (O. Tr. 97-98) that the handcuffs placed on him by Dracoulis were not tight, that Dracoulis treated him civilly, and that it never crossed his mind that if he did not make a statement Dracoulis would tighten the handcuffs. Petitioner again confessed to DEA Agent Eakes upon his arrival in Corpus Christi. At the time petitioner made this statement, he was not handcuffed and was in no visible physical discomfort (O. Tr. 100-102).

[7] Indeed, the only person who suffered any pain as a result of the struggle was Agent Jacobs, who scraped his hands in placing the handcuffs on petitioner (O. Tr. 74).

On the basis of this evidence the district court correctly ruled (O. Tr. 105) that Ogden's confessions were voluntarily made and therefore admissible. There is no reason for this Court to review this essentially factual determination. See *Berenyi* v. *District Director*, 385 U.S. 630, 635-636 (1967).[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner Ogden's allegation (Pet. 6) that his confession was extorted by threats of filing assault charges against him is spurious. Testimony concerning this allegation (O. Tr. 83) showed that no such threats were made and that the charge of aggravated assault brought against petitioner on Agent Reed's behalf was filed after petitioner had made his confessions.

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